Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1985

SUZANNE LINDLEY DALY,

Petitioner,

vs.

NAN TOEWS DALY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

ANN CASAMAJOR
Post Office Box 6246
Albany, California 94706

GREINES, MARTIN, STEIN & RICHLAND
KENT L. RICHLAND
FERIS M. GREENBERGER
PAMELA E. DUNN
9601 Wilshire Boulevard
Suite 508
Beverly Hills, California 90210
Telephone: (213) 859-7811

Attorneys for Petitioner
SUZANNE LINDLEY DALY

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions requiring plenary consideration by this Court:

1. May the State of Nevada, consistent with the Due Process Clause of the Fourteenth Amendment, permanently and irrevocably terminate a parent's rights in her natural child without any showing of parental unfitness, and solely on the basis that the action is in the "best interests of the child," as those interests are subjectively conceived by the Nevada courts?

2. Is a Nevada statute which permits the complete and permanent termination of parental rights on the ground of "risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent," void for vagueness and therefore violative of the Due Process Clause of the Fourteenth Amendment?

3. May the State of Nevada, consistent with the guarantees of the Equal Protection Clause of the Fourteenth Amendment, irrevocably, completely and permanently deprive a person of the fundamental parental rights in her natural child solely because that parent suffered from a medical condition commonly known as transsexualism and received medically-authorized treatment for that condition?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Petitioner Suzanne Lindley Daly prays that a Writ of Certiorari will issue to review the order and opinion of the Supreme Court of the State of Nevada which permanently and irrevocably terminated her rights as a natural parent.

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OPINIONS BELOW

The opinions of the Supreme Court of the State of Nevada were filed on March 6, 1986, and are published at 102 Nevada Advance Opinion 20, 715 P.2d 56. App. 1-20.

The trial court's written decision, findings of fact and conclusions of law and judgment upheld by the Nevada Supreme Court, are reproduced in the Appendix at pages 21-38.

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JURISDICTION

The judgment of the Supreme Court of Nevada was filed on March 6, 1986. By order dated May 21, 1986, Circuit Justice Rehnquist extended the time for filing this petition for writ of certiorari to and including July 3, 1986.

The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. § 1257, subdivision (3).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Nevada Statutes involved in this case are reproduced in the Appendix at pages 39-44.

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STATEMENT OF THE CASE

Narrowmindedness has triumphed over reason in this tragic case. Shockingly, petitioner Suzanne Lindley Daly's courageous decision to obtain sex reassignment surgery—the only known treatment for the recognized medical condition known as gender dysphoria (commonly, transsexualism)—has resulted directly in the permanent and irrevocable termination of her fundamental parental rights with respect to Mary Toews Daly, her only child.

Suzanne was diagnosed as gender dysphoric in 1981.[1] Despite the burden of the disorder, she led an exemplary life as Tim Daly, which she continues as Suzanne Daly.[2] After high school, she received an appointment to the United States Naval Academy at Annapolis, but could not attend because of poor eyesight. Instead, she enlisted in the United States Army and served honorably. She was educated at the University of California at Berkeley and received degrees in both Anthropology and Slavic Languages and Literatures and worked at the Lawrence Berke-

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[1] A transsexual, or a person with gender dysphoria, "has a core identity contradictory to that designated by genital anatomy." Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 692, 692 (1978). We refer to Suzanne as a former transsexual because, after the medical procedures are completed, a candidate for sex reassignment surgery is properly referred to as a former transsexual. See generally Comment, *M.T. v. J.T.: An Enlightened Perspective on Transsexualism*, 6 Cap. U.L. Rev. 403, 403-10 (1976-1977); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn. L. Rev. 288, 288-94 (1974-1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 965-72 (1970-1971).

[2] Her name was legally changed to Suzanne Lindley Daly in December 1982, and she is legally a woman under the laws of California. II ROA 3, 301. For consistency, we use feminine pronouns in discussing Suzanne's life both before and after her surgery.

ley Laboratory. Following graduation, she continued to work at that lab, where she continues today to make her career as a scientific research specialist, designing and building complex research equipment and experimental devices. II ROA 125, 128-30, 133-36, 301-03.

Suzanne married respondent Nan Toews Daly in Oakland, California on September 17, 1969. Their only child, Mary Toews Daly, was born on August 21, 1973.

On March 6, 1986, some thirteen years later, the Nevada Supreme Court—by a narrow majority and over a strong dissent—affirmed a trial court decision extinguishing Suzanne's parental rights in her child; as a result, Suzanne is now forever deprived of the fundamental right to be Mary's parent.

The parties lived as a family in Oakland, California throughout their marriage. When they separated in August 1978, respondent moved with Mary from Oakland to Reno, Nevada. Suzanne traveled to Reno to visit with her child regularly every four to six weeks. II ROA 9, 21. On these visits, Suzanne would sometimes bring kits which she and her child would assemble together, and sometimes she would bring books to read. II ROA 22-23.

In May 1979, Suzanne asked respondent for a divorce. II ROA 23-24. The Nevada district court entered its judgment and decree of divorce on February 17, 1981, granting respondent custody of Mary with visitation rights to Suzanne. I ROA 55. After the divorce, Suzanne continued to visit with her child even though the hostility between the parents was intense. During a month-long visit by Mary to Oakland in August 1981, in the same home where Mary was born and had lived with her parents until their

separation, Suzanne carefully explained to and shared with Mary her plans for her own life. II ROA 343.

It was during this very visit with her child that Suzanne first used the word "transsexual" to identify herself, though she had long been exploring that aspect of her personality. II ROA 322. Indeed, she had resisted accepting herself by that term largely because of her strong parental love and consideration for Mary which, up to that point, had prevented her from seeking the medical attention she needed. II ROA 322-23. But now, she knew she "didn't want to lie to anyone, and above all, [she] didn't want to lie to [her]self." *Id.*

Suzanne explained to her child in various conversations some of what she had learned about herself. She explained that she would be "changing" because she was a transsexual, and she told Mary how she felt about herself. II ROA 322, 323, 324, 343. After many discussions, Suzanne felt not only that Mary had understood what was being shared with her but also that Mary was pleased Suzanne had confided in her about something so important. II ROA 344, 345. Because Suzanne believed respondent and Mary's maternal grandmother would "use it against" Suzanne, she suggested to her daughter that she not tell them about their private discussions. II ROA 348.

Mary continued to visit with Suzanne in Oakland after these discussions. They visited in October 1981 and again in January 1982, and Suzanne noticed no difference between her child's demeanor during this period and the preceding twelve-month period. II ROA 242, 346.

Mary revealed her father's medical condition and plans to respondent in February 1982; since that time,

Suzanne has been totally barred from seeing her child. II ROA 28. That is, respondent has prevented Suzanne from visiting with her child for the past four-and-one-half years, solely because Suzanne was transsexual. II ROA 222.

When Suzanne attempted to visit Mary in Reno in February 1982, respondent had armed sheriffs chase her away even though there was no court order preventing the visitation, which was pursuant to the divorce and custody decree. II ROA 225. Then, in August of 1982, respondent refused to pick up Suzanne's birthday present for Mary at the post office. II ROA 229-31. She also instructed Suzanne not to telephone Mary. One day in January 1983, respondent prevented Suzanne from reaching Mary by invoking a non-existent court order; later that same day, Mary's maternal grandmother chased Suzanne away at rifle point, putting an end to Suzanne's final futile attempt to make contact with Mary. II ROA 228-31.

On May 12, 1982, respondent filed a petition in Nevada District Court for an order terminating Suzanne's rights as a parent, pursuant to Nevada Revised Statute 128.105. Although she failed to set forth any facts at all to justify such a drastic step, respondent claimed in her verified petition that Suzanne was unfit to be a parent and that there was a risk of serious physical, mental or emotional injury to the child if she were allowed to visit with Suzanne.

The two-day trial in these proceedings took place on February 22 and 23, 1983. Respondent dredged up grievances from before the divorce and made accusations of non-support and abandonment which were audacious in light of the Iron Curtain she had erected between Mary and

Suzanne; but these accusations were merely peripheral to her crusade.[3] Rather, the termination proceedings were unmistakably a referendum on transsexualism. Respondent cast Suzanne as the heretic, flatly testifying that she petitioned to extinguish Suzanne's parental status because of her personal belief that it was unhealthy and unnecessary for Mary to deal with the fact that her father is now a woman. In respondent's view, "Mary's father doesn't exist anymore." II ROA 263.

Respondent could not marshall much evidence to support her views. Dr. Richard Weiher, a psychologist who examined Mary for one hour, less than three weeks before the trial, testified on behalf of respondent that Mary is "probably about as happy as most other nine-year-olds," and is developing well within normal limits. II ROA 49. The clear thrust of Weiher's testimony was that *visitation* between Suzanne and Mary should perhaps not be reinstated as of the time of trial, but that any parent-child problem ultimately could best be corrected by evaluation of Suzanne's emotional stability to see if she is "capable of exercising good and consistent judgment," followed by

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[3] The trial court ignored these grounds in its findings of fact and conclusions of law, as well as in its decision, specifically noting that Suzanne "has been denied any contact with Mary." App. 22, 30. In addition, Suzanne's trial counsel impeached much of respondent's testimony regarding support. *E.g.*, II ROA 194-221. Further, to dispel any remaining suggestion of abandonment or non-support, the dissenting members of the Nevada Supreme Court noted that Suzanne "was attempting to regain visitation rights during this same period," but "was hindered by counsel who evidently did not expeditiously aid [her] cause." The dissent cogently concluded, "Where a parent attempts through an attorney to regain his rights, we obviously should not hold that he has abandoned his child merely because of the seemingly ineffective assistance of counsel." App. 16, n. 4.

counseling to bring Suzanne, Mary and the natural mother "together." II ROA 64-65. Indeed, he testified that counseling would be as good a resolution as terminating visitation with Suzanne. II ROA 70. Weiher felt, however, that *respondent* was not "willing to go to these lengths and try and effect some sort of reconciliation [even] if it would be in Mary's best interest." II ROA 67.

Respondent testified that Mary told her in February 1982 that Suzanne was a transsexual. II ROA 28. She testified that Mary told her to sit down, took "the role of a mother," patted her hands, and said "Mom, you know dad and his long hair, well, he is a transsexual." II ROA 28-29. Respondent described Mary's attitude at that time as not that of a nine-year-old, but as being "very mature":

> "She was being my mother. She was holding my hands. She was patting my hands. She was telling me in a very calm voice that dad is a transsexual." *Id.*

In hindsight, respondent noticed that Mary had changed after she returned from the summer visit with Suzanne—for example, she was "hyper" and she wet the bed. II ROA 31. Her handwriting purportedly "degenerated into a scrawl"[4] and she seemed somehow inattentive. II ROA 32. She felt that these changes in Mary, a certified academically-talented child since age 7, stemmed entirely from Suzanne's change and the fact that Suzanne confided in the child. Neither Mary's teacher nor her next-door-neighbor, however, noticed any changes in Mary's behavior during this period. II ROA 84, 92-93.

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[4] No samples were produced to substantiate this claim.

Dr. Ira Pauly, psychiatrist and internationally-recognized specialist in gender identity disorders, testified on Suzanne's behalf. II ROA 93. Dr. Pauly testified that transsexualism is a gender disorder in which the "biological identity of the individual is inconsistent with the gender identity . . . [h]is genetic anatomical [identity] being male on one side, and his psychological identity being female on the other hand." II ROA 114. He explained that there is *only one* known treatment for the condition: careful evaluation for no less than six months, followed by the "Real Life Test," in which the patient is encouraged to live in the gender of his preference (so a man who feels he was born into the wrong body lives as a woman), concurrent with no less than twelve months of hormone therapy, and finally sex reassignment surgery. II ROA 96, 99. He testified that people do "extremely well with this [medical] procedure." II ROA 99. As to the impact of gender dysphoria on parent-child relationships, Pauly explained that "the bottom line is, if the child has felt himself to be loved by this person, I think he can accept the rather traumatic transformation, as long as he feels that he will continue to get love and support from his biological parent." II ROA 110-11. He said that "there ought to be ways of assessing one's parent capability, even if they happen to be caught up with a very complicated problem known as transsexualism," because there is nothing about "the issue of transsexualism, per se," which will affect the parent-child relationhip. II ROA 113.

At closing, Suzanne reminded the trial court of her fundamental right to be Mary's parent. III ROA 19. The point was buried, however, in the hysteria of respondent's

summation, in which Suzanne was labeled a "pervert." III ROA 4. Respondent asserted Suzanne "is selfish," that she "is not normal," that she "has a disturbed sense of values," and that her lifestyle is "completely alien to society." III ROA 4, 5, 8. She characterized Suzanne's longing to have Mary know, understand and accept her for what she is as "brainwashing," and "playing games with Mary's mind."[5] III ROA 6, 7. In respondent's twisted characterization, Suzanne was "preying on" Mary, simply by seeking to know and be known by her. III ROA 7.

Based on the meager facts presented to it, the trial court somehow found it appropriate to extinguish Suzanne's parental rights in Mary. In ordering the termination of this precious fundamental right, the trial court found that Suzanne had been denied any contact with Mary by respondent for over a year, but that the "dominant purpose" of the proceedings to terminate Suzanne's rights as a parent was to assess the "best interests of the child," which the court felt somehow were best served by ending the parent-child relationship altogether. I ROA 55-61.

Suzanne appealed the trial court's judgment to the Supreme Court of Nevada. I ROA 66. There, her counsel argued, among other issues, that Suzanne was denied due process and equal protection under the Fourteenth Amendment to the United States Constitution and that the Nevada parental termination statutes are void because they

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[5] Since by the time of trial respondent had convinced Mary that her father "doesn't exist any more" and "is dead," this last charge is surely an egregious case of the pot calling the kettle black. II ROA 263.

are unconstitutionally vague. App. 50-72. In affirming the trial court's judgment, the Nevada Supreme Court chose not to address the constitutional issues raised, except for a summary dismissal of Suzanne's equal protection argument, but ruled that on the record it reviewed, the lower court's decision was entitled to due deference. Three members of the court then affirmed the lower court's judgment. Without addressing the constitutional issues raised, a two-member dissent recognized that the majority's decision was premised solely on its prejudices regarding Suzanne's medical condition and stated that the decision to terminate Suzanne's parental rights could not properly be premised on the potential effects of visitation rights. The dissent observed that on the record it reviewed there was no adequate basis upon which to terminate Suzanne's parental rights in Mary, her only child.

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REASONS FOR GRANTING THE WRIT

I.

THE STATE OF NEVADA HAS VIOLATED PETITIONER SUZANNE DALY'S RIGHTS GUARANTEED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BY PERMANENTLY DEPRIVING SUZANNE OF HER FUNDAMENTAL RIGHTS AS A NATURAL PARENT WITHOUT A SHOWING OF PARENTAL UNFITNESS AND SOLELY BECAUSE OF A BELIEF THAT SUCH DRASTIC ACTION WAS IN HER CHILD'S "BEST INTERESTS," AS THOSE INTERESTS WERE CONCEIVED BY THE NEVADA COURTS.

The Nevada Supreme Court terminated Suzanne Daly's fundamental rights as a natural parent without ei-

ther evidence of, or any determination that, she is unfit to be her daughter's parent. Instead, that court's decision, like that of the trial court it affirmed, was premised entirely upon the belief that for Suzanne to continue visiting with her natural child would not be in the child's "best interests." Such an irrational and drastic interference with Suzanne's fundamental rights patently violates the Due Process Clause of the Fourteenth Amendment.

This Court has long recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (and cases cited therein). "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981) quoting *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). "A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one." *Id.* (footnote omitted).

In *Quilloin v. Walcott,* 434 U.S. 246 (1978), this Court unanimously declared that the State cannot, consistent with principles of due process, interfere with a natural parent's fundamental right to be a parent absent a showing of parental unfitness, and may not premise the judicial dismemberment of a family solely on a determination that that result may be in the child's best interests, as those interests are assessed by the State. "We have little doubt

that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)). For the State to terminate an individual's parental rights based solely upon its own predilections as to what are the "best interests of the child"—without any determination regarding the parent's fitness as a parent—smacks of totalitarianism at its most pernicious. Thus, thirteen years ago this Court recognized that "as a matter of due process of law, [a parent is] entitled to a hearing on his *fitness* as a parent before his children [are] taken from him . . . ." *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (emphasis added). More recently, in *Santosky*, this Court observed that a judgment terminating parental rights necessarily "entails a judicial determination that the parents are *unfit* to raise their own children." *Santosky*, 455 U.S. at 760 (emphasis supplied).

A determination to invade a parent's fundamental interest in a natural child without some finding of parental fault, but solely because such a determination is thought to be in the child's best interests, allows the interference with a precious liberty interest to be based upon the judge's subjective belief system rather than objective evidence. Indeed, "[t]his court more than once has adverted to the fact that the best interests of the child standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."

Lassiter v. Department of Social Services, 452 U.S. 18, 46, n. 13 (Blackmun, J., dissenting). As one knowledgeable commentator has pointed out, "a careful review of case law and literature strongly indicates that the [best interest of the child] terminology has been construed and deliberated to such a degree as to have reduced its judicial meaning to total subjectivity without delineation." Levine, *Foundation for Drafting a Model Statute to Terminate Parental Rights: A Select Bibliography,* 26 Juv. Just. 42, 43 (August 1975).[6]

Even though the Nevada Supreme Court had previously acknowledged that Nevada could not constitutionally terminate a parent's "sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship," *Champagne v. Welfare Division,* 100 Nev. 640, 648, 691 P.2d 849, 855 (1984) (footnote omitted, original emphasis), in this case both the trial court and the Nevada Supreme Court simply lost sight of the necessity of this fundamental constitutional protection. The trial court's decision and findings of fact and conclusions of law are not premised on any finding of parental unfitness.[7] Rather, that court's written decision makes plain that the court terminated Suzanne's funda-

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[6] See, e.g., *In re McDonald* — Iowa —, 201 N.W.2d 447 (1972) [court terminated parental rights of parents whose IQs were lower than their children's solely on the ground that the children did not receive proper intellectual stimuli].

[7] The Legislature has defined an "unfit parent" as "any parent of a child who, by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." NRS 128.018, App. 39-40.

mental rights solely because of its own conception of Mary's "best interests." Thus, the court observed that,

> "[T]he polar star of termination proceedings is the best interests of this child only. The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be terminated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child." App. 22, 31.

Indeed, the trial court's *only* reference to unfitness was the following observation, a thinly-disguised expression of the court's prejudices:

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not the best interests of the child or for the child's welfare." App. 24, 33.[8]

Thus, as the trial court explained, its decision to extinguish permanently Suzanne's parental rights was clearly based on its belief that such drastic action was in the child's best interest, not upon any finding that Suzanne was unfit to raise her child.

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[8] The trial court's fixation on visitation was echoed in the Nevada Supreme Court's majority opinion. Indeed, the majority's obsession with visitation consumes its decision, for in its short opinion, the majority refers to visitation on no less than fifteen separate occasions. But, of course, as the Supreme Court dissenters pointed out, that issue was a red herring and had no business being considered in these proceedings. Because the statutory scheme governing parental termination proceedings is so vague that it allows a trial court to ground its termination decision on whether or not visitation is in the child's best interests, the statute is unconstitutional. See Issue II, below.

The majority opinion of the Nevada Supreme Court also elevated its conception of the child's "best interests" above Suzanne's rights as a parent, conceding that its decision was not premised on any determination of parental unfitness. The majority observed that "[i]t must be remembered that in termination proceedings, the *interests of the child are paramount* and a child should not be forced to undergo psychological adjustments, especially in view of the risk involved, *solely to avoid termination of a parent's rights.*" App. 5-6 (emphasis added). As in the trial court, the thrust of the court's decision rests on its belief that visitation with Suzanne is not in the child's best interests. The majority admits that the trial court did not conclude that Suzanne was an unfit parent. Nonetheless, the majority condones the trial court's decision and concludes that the "effect [visitation] had upon Mary" left it no alternative but to terminate Suzanne's parental rights. App. 5, n. 4.[9]

In spite of this Court's clear recognition that due process requires that termination of a parent's natural rights must be premised on a finding of parental unfitness, not just State authorities' concepts of the child's "best interests," Nevada terminated Suzanne's fundamental parental rights in her natural child solely because the Nevada courts determined that visitation with a parent suffering from gender dysphoria was incompatible with their notion of the

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[9] There is nothing in the record to support the majority's suggestion that the trial court determined that Suzanne abandoned her child. The evidence showed, and the trial court expressly found, that Suzanne was *denied* contact with her child for the twelve months preceding the hearing; thus, as the dissent astutely noted, there was no basis for the conclusion that Suzanne evinced a "settled purpose . . . relinquishing all claims to the child." NRS 128.012(1).

child's "best interest"—notwithstanding the utter lack of evidence of parental unfitness. Accordingly, petitioner Suzanne Daly has been denied her fundamental right to parenthood guaranteed by the Due Process Clause of the Fourteenth Amendment.

II.

NEVADA REVISED STATUTE 128.105, SUBDIVISION (4) OF NEVADA'S PARENTAL TERMINATION STATUTES IS UNCONSTITUTIONALLY VAGUE, AND THEREFORE OFFENSIVE TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

NRS 128.105 provides six considerations upon which an order terminating parental rights may be based. These considerations relate "to parental conduct or incapacity and the parent's suitability as a parent." *Champagne v. Welfare Division*, 100 Nev. 640, 646, 691 P.2d 849, 854 (1984) (footnote omitted). That is, this portion of the Nevada parental termination statutes describes the "specific fault or condition directly related to the parents" which comprises the jurisdictional grounds for termination. *Id.* NRS 128.105, subdivision (4), states that one such condition is "[r]isk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents." As the Supreme Court of Nevada recognized, it was this subsection upon which the trial court purported to base its decision to extinguish Suzanne Daly's fundamental rights as a parent. That court determined that the trial court's primary focus was "upon the risk of serious physical, mental or emotional injury to the child if visitation were resumed and the child were forced to maintain contact

with [Suzanne Daly]. NRS 128.105(4)." App. 4-5. On its face, this subdivision is unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment because it fails to clarify what type of parental fault or conduct may result in a risk of harm to the child.

Because this subsection provided no fair warning to Suzanne Daly of the type of conduct which would subject her to the application of the statute, and because the statute is subject to arbitrary application and, in the instant case, arbitrarily interfered with Suzanne's fundamental rights as a parent, the statute is unconstitutionally vague in violation of the Due Process Clause.

This Court has determined that a civil statute is unconstitutionally vague when it arbitrarily deprives a citizen of a liberty interest as guaranteed under the Constitution. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). That is precisely what has occurred here. Relying upon this statute, the courts of Nevada have deprived Suzanne of her fundamental liberty interest—her status as a parent. Thus, NRS 128.105, subdivision (4) must "meet the challenge that it is unconstitutionally vague." *Id.*

"Vague statutes . . . carry three dangers: the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right." *Alsager v. District Court*, 406 F.Supp. 10, 18 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976). All three of these dangers are present in NRS 128.105, subdivision (4).

First, NRS 128.105, subdivision (4) gives absolutely no warning of the type of conduct it seeks to control. The

statutory language is "susceptible to multifarious interpretations which prevent the ordinary person from knowing what is and what is not prohibited." *Alsager*, 406 F.Supp. at 18. That is, as could happen under the similarly worded and unconstitutionally vague statute at issue in *Alsager*, "a parent might follow a rigid scheme of 'discipline-instilling' corporal punishment believing himself in full compliance with the law, only to learn of his folly at a termination proceeding." *Ibid.*, (footnote omitted). Or, as the statute was interpreted in this case, a parent like Suzanne might undergo medically approved sex reassignment surgery without any warning that the medical procedure would someday be used against her to extinguish forever her cherished right of parenthood. Thus, this subdivision "trap[s] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Second, this subdivision confers upon state officials and courts so much discretion in interpreting and applying the statute that it encourages arbitrary and discriminatory parental terminations. Any conceivable conduct is susceptible to classification by the Nevada courts as involving a "risk of serious harm." This is so because the state judges in Nevada are afforded the discretion to determine not only what is a "risk of harm," but also whether the supposed risk is serious enough to require termination of parental rights. "The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child rearing." *Alsager*, 406 F.Supp. at 18-19.

This Court has recently observed that "[a]lthough the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)). Thus, a statute such as the one at issue here, which fails to provide any minimal guidelines, permits "a standardless sweep [that] allows [judges] to pursue their personal predilections." *Id.* at 358 (citations omitted).

" 'In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.' " *Id.* at 355 (quoting *Hoffman Estates v. Flipside, Hoffman Estates Inc.,* 455 U.S. 489, 494, n.5 (1982)). If the Nevada courts have established standards and guidelines in interpreting the statute, the vagueness may have been cured. However, the Nevada decisions have utterly failed to provide any consistent construction of this subsection. Thus, in *Champagne v. Welfare Division,* 100 Nev. 640, 691 P.2d 849 (1984), the Nevada Supreme Court suggested this subsection meant "substantial child abuse," while in the present case the statute was construed to mean "visiting a parent who had undergone medically approved sex reassignment surgery."

Since NRS 128.105(4) fails to provide fair warning to those against whom it may be exercised, permissibly delegates discretion in its interpretation and application, and undeniably inhibits legitimate exercise of a most precious

constitutional right, the statute is unconstitutionally vague and in violation of the Due Process Clause of the Fourteenth Amendment.

III.

THE STATE OF NEVADA HAS DEPRIVED SUZANNE DALY OF EQUAL TREATMENT UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BY IRREVOCABLY, COMPLETELY AND PERMANENTLY DEPRIVING SUZANNE OF HER FUNDAMENTAL RIGHTS AS A NATURAL PARENT SOLELY BECAUSE SHE SUFFERED FROM AND WAS TREATED FOR A MEDICAL CONDITION COMMONLY KNOWN AS TRANSSEXUALISM.

As previously discussed, this Court "historical[ly] recogni[zed] that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (and cases cited therein). Indeed, a parent's rights in her natural child are rights "far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)). The Nevada courts have completely and irrevocably extinguished Suzanne Daly's precious parental rights solely because Suzanne has suffered from and been treated for a medical condition commonly known as transsexualism. This drastic and permanent action by the Nevada courts has denied Suzanne her right to equal treatment under the law in violation of the Equal Protection Clause of the Fourteenth Amendment.

"The concept of equal justice under the law requires the State to govern impartially." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). By permanently terminating Su-

zanne's fundamental parental rights because she suffered from a gender disorder for which she has been fully and effectively treated, the Nevada courts have created an entirely irrational classification vis-a-vis the rights at issue. The plain effect of the ruling of the Nevada courts is to create and treat unequally two similarly situated classes: parents who are suffering from the medical condition known as transsexualism and all other parents.

As this Court has recognized, "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966). In strictly scrutinizing court actions where invidious discrimination results in a classification which invades a fundamental right, " 'the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' " *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)). Furthermore, "if a challenged [court ruling] grants the right [to parenthood] to some citizens and denies the [right] to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' " *Id.* at 337 (citations omitted, original emphasis). Nevada's actions simply cannot survive these tests.

No state interest, much less a compelling one, justifies the termination of parental rights based solely upon the parent's status as a former transsexual. Not only was there no evidence that anything about gender dysphoria would render an individual unfit to be a parent, the evidence was to the contrary: Dr. Pauly testified that there was

nothing in the condition of transsexualism which would, by itself, disqualify an individual from being a fully effective and loving parent. Moreover, the state's interest in parental rights termination proceedings is "a *parens patriae* interest in preserving and promoting the welfare of the child." *Santosky v. Kramer,* 455 U.S. at 766. This interest "favors preservation, not severance, of natural familial bonds." *Id.* at 766-67 (footnote omitted). Thus, the "State registers no gain towards its declared goals when it [terminates parental rights]." *Stanley v. Illinois,* 405 U.S. at 652.[10]

"[I]f there are other, reasonable goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein,* 405 U.S. at 343 (citation omitted). The record indicates, as the dissenting Nevada Supreme Court justices pointed out, that there is a far less drastic means for the courts to achieve some harmony in this child's life. Counseling to attempt to bring the family together was the clear preference of both experts at the hearing. Certainly, this means of resolving any strife among the family members is less drastic and more humane than erasing a parent.

That, out of ignorance, respondent dislikes and despises Suzanne's condition is certainly clear from the record. "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible consideration for [permanent termination] of

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[10] Indeed, "if [Suzanne] is a fit parent, the State spites its own articulated goals when it needlessly terminates [her rights in her natural child]." *Stanley v. Illinois,* 405 U.S. at 653.

an infant child from . . . its natural [parent]." *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 1882 (1984). As Chief Justice Burger said, writing for a unanimous Court:

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held.'" *Id.* (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Suzanne Daly's fundamental parental rights were permanently severed because of an invidious classification based entirely upon her gender identity disorder. As a result, Suzanne has been denied equal treatment as guaranteed under the Equal Protection Clause of the Fourteenth Amendment.

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CONCLUSION

Suzanne Lindley Daly's fundamental rights as a parent of her natural child were irrevocably, permanently, and completely extinguished by the Nevada Supreme Court, in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Only this Court can correct this unconsitutional state court action. Accordingly, this Honor-

able Court should grant Suzanne Daly's Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Respectfully submitted,

ANN CASAMAJOR
GREINES, MARTIN, STEIN & RICHLAND
KENT L. RICHLAND
FERIS M. GREENBERGER
PAMELA E. DUNN

Attorneys for Petitioner
Suzanne Lindley Daly

APPENDIX

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IN THE SUPREME COURT OF THE
STATE OF NEVADA

SUZANNE LINDLEY DALY, Formerly Known as TIM DALY, Appellant *v.* NAN TOEWS DALY, Respondent.

No. 15423

March 6, 1986

Appeal from a district court's order terminating appellant's parental rights. Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Affirmed.

Ann Casamajor, Albany, California, and *Semenza & Brown,* Reno, for Appellant.

Nada Novakovich, Reno, for Respondent.

OPINION

By the Court, STEFFEN, J.:

Appellant, a transsexual, contends that there is no legal basis for the order terminating her parental rights and that the lower court is merely and improperly enforcing the private prejudices of the respondent. Palmore v. Sidote, 104 S.Ct. 1879 (1984). We have considered the arguments presented by counsel, carefully reviewed the record and conclude that the district court ruled correctly and should be affirmed.

Respondent Nan Daly is the natural mother of the child. Appellant Suzanne Daly is the natural father of

the child. Appellant's name was changed from Tim Daly on December 9, 1982. Appellant underwent sex-reassignment surgery, changing her sexual anatomy from male to female, on December 13, 1983, after a trial period of living as a female for approximately one year.

The parties were married September 17, 1969, at Oakland, California. The minor child at issue in this action, Mary Toews Daly, was born August 21, 1973, at Oakland. A final decree of divorce was entered February 17, 1981, at Reno, Nevada, in the Second Judicial District Court. Respondent was awarded custody and control of Mary, subject to the visitation rights of appellant. Initially, appellant regularly exercised visitation rights under the decree, seeing the child approximately one weekend per month, alternate holidays and one month in the summer of 1981.

While Mary was with appellant in August, 1981, appellant revealed that she was a transsexual and would be undergoing hormonal and surgical reassignment as a female under the care of medical professionals.[1] Appellant told Mary that neither respondent nor her grandmother, who lives with respondent, should know of appellant's plans. Mary did not reveal appellant's intentions for six months.

When Mary returned from her visit to Oakland in August of 1981, respondent noticed she was withdrawn and afraid to tell her something. On February 14, 1982,

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[1]Soon thereafter, Suzanne introduced Mary to the community of alternate lifestyles by taking her to a session at the Pacific Center where other transsexuals gather for support and counseling and discuss their experiences with one another.

Mary revealed her father's plans to her mother. Mary was taken to a psychologist and evaluated by Dr. Towle, who advised respondent that it was very dangerous to allow Mary to be in the company of her father again.

Respondent testified that when Mary returned from the August visitation with her father, she would vacillate from being wide awake to being very sluggish. A certified academically talented child since seven years of age, she would sit at the kitchen table for hours cutting a large piece of paper into small pieces. She would take a pencil and trace the grain of the oak floor for hours. She wet the bed and, in fact, was incontinent in class a week prior to trial. Mary had not wet the bed since she was two years old. She had a short attention span and could not follow instructions, nor perform simple tasks. She also became inattentive and her handwriting degenerated into a scrawl. In addition, Mary became quiet and withdrawn.

In May of 1982, the respondent mother petitioned the lower court to terminate appellant's parental rights. On April 11, 1983, the court rendered its decision terminating appellant's parental rights. Appellant thereafter appealed.

In Carson v. Lowe, 76 Nev. 446, 357 P.2d 591 (1960), this Court recognized its duty to scrutinize the termination of parental rights. Moreover, this Court in Cloninger v. Russell, 98 Nev. 597, 655 P.2d 528 (1982), adopted the clear and convincing evidence standard of proof in parental rights termination proceedings as set forth in Santosky v. Kramer, 455 U.S. 745 (1982). NRS 128.110 authorizes the termination of parental rights upon finding grounds pursuant to NRS 128.105. In the recent decision

of Champagne v. Welfare Division of the Nevada State Department of Human Resources, 100 Nev. 640, 691 P.2d 849 (1984), we elaborated on the grounds set forth in NRS 128.105 and held that there must be a finding of both jurisdictional and dispositional grounds in order to justify issuance of a termination order. Our review of the evidence in the instant case persuades us that both grounds were satisfied.

JURISDICTIONAL GROUNDS

NRS 128.105[2] specifies the jurisdictional grounds for termination. The district court primarily focused upon the risk of serious physical, mental or emotional injury to the

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[2]NRS 128.105 recognizes the following jurisdictional grounds:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent;

(d) To eliminate the risk of serious physical, mental or emotional injury to the child, or

6. With respect to termination of parental rights of one parent, the abandonment by that parent.

child if visitation were resumed and the child were forced to maintain contact with appellant.[3] NRS 128.105(4).

At trial Dr. Weiheir, respondent's expert witness who examined Mary, testified that there is a serious risk of emotional or mental injury to the child if she were allowed to be in her father's presence. In addition, the doctor testified that Mary would not be injured if she did not see her father again. The doctor also considered alternatives, such as consultation with psychologists and psychiatrists and testified there was no guarantee it would work and that there would be a serious risk of emotional injury.[4] It is precisely this risk that the lower court was asked to eliminate. It must be remembered that in termination proceedings, the

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[3]In addition to the risk to Mary involved in this case, the evidence indicates that appellant left Mary in the care and custody of Nan Daly without privision for the child's support and without communication for more than six months. This constitutes a presumption of abandonment under NRS 128.012(2). Abandonment is also an acceptable jurisdictional ground for termination proceedings. *See* NRS 128.105(1). Moreover, what little communication or attempted communication existed during this period consisted of token efforts; again a recognized jurisdictional ground. *See* NRS 128.105(5)(a). Hence, the court's decision was fully supported on the issue of jurisdiction.

[4]While other court's have imposed certain restrictions upon visitation with the child, such as the length of visitation, the location, or type of permissible activity, in this case such restrictions would accomplish nothing. The court recognized the effect appellant's transsexualism had upon Mary; any modification in visitation would not change that fact. To reiterate, the court did not conclude that appellant was an unfit parent merely because she is a transsexual. Rather, the court recognized the *effect* the situation had upon Mary in this time of her life and the serious risk of emotional or mental injury if visitation were allowed. Mary is very uncomfortable about the possibility of resuming visitation and is presently unprepared to cope with such a prospect.

interests of the child are paramount and a child should not be forced to undergo psychological adjustments, especially in view of the risk involved, solely to avoid termination of a parent's rights. Certainly a parent's rights should be preserved if at all possible, but not at the expense of the child.

Appellant's expert witness also provided support for respondent's position by testifying that there are children who are not able to accept a parent as a transsexual. This witness also stated this was a new area and concluded there is a risk that there would be harm done in either direction. Dr. Weiheir, however, had the opportunity to observe and interview Mary and determined the risk to Mary would exist only if visitation were forced upon Mary.

Notwithstanding the possible harm that would befall Mary if visitation were resumed, NRS 128.107 provides that the child's desires regarding the termination should be a specific consideration, if the child has sufficient capacity to express his or her desires. Considering Mary's age and intelligence, the lower court found her to have the requisite capacity. We agree with the court's finding. In the present case, Mary told Dr. Weiheir and the trial judge that she did not want to see her father. Mary also said it would be disturbing to visit with her father and made it graphically clear that she didn't want to see him again.

The evidence presented in this case decisively establishes the jurisdictional grounds necessary to terminate parental rights. Therefore, our attention will now focus upon the dispositional grounds.

DISPOSITIONAL GROUNDS

Dispositional grounds are satisfied when it is found that the termination is in the child's best interests. At trial, it was undisputed that Mary's mother, Nan, is a very loving and conscientious mother who provides a desirable environment for her daughter. Nan always keeps Mary well fed and clothed and is absolutely dedicated to her child. At the present time, Mary is happy and well adjusted. Nevertheless, if visitation were permitted, there would be a risk of serious maladjustment, mental or emotional injury. Hence, recognizing Mary's present situation, her attitude and feelings, and the substantial risk of emotional or mental injury were she forced to visit with her father, it appears clear that termination of appellant's parental rights is in Mary's best interest.[5]

The trial court was fully aware of the seriousness and finality of a decree terminating parental rights, noting that such a remedy should be applied with caution. The court carefully considered the record and found abandonment and risk of serious mental and emotional harm. The court also found Suzanne to be a selfish person whose own needs,

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[5]It was shown that Mary is at the tender age when she is very much concerned about the impression of her peers and doesn't want to have any sort of uncomfortable fears. Mary would prefer to have her personal life remain a private event. By terminating Suzanne's parental rights, Mary will finally have the assurance and comfort of knowing the visitation matter is settled. Also, Mary's emotional state is preserved, thereby providing her the forum to mature and resolve the situation in her own way. There is nothing to prevent Mary from rekindling the relationship with her father in later years if she so desires, but that choice should be hers, made at a time when the risk of emotional or mental injury is eliminated.

desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary.

Our review of the record indicates that the district court's findings are fully supported therein. Suzanne's efforts to regain visitation rights are shown to be a continuing source of apprehension to the child. Suzanne's solution is to subject the child to psychiatric counseling in order to change her mental attitude concerning her father's condition. Inferentially, the child will be more likely to succumb to a process of mental conditioning if she realizes that she will be forced to endure periods of visitation with Suzanne. However, expert testimony at trial reflects substantial doubt as to the success of such counseling at best, and a serious risk of further emotional injury to the child at worst. Such considerations are further complicated by the apparent degree of Mary's revulsion over Suzanne and the irretrievable loss of Suzanne's former relationship with Mary as a parent-father. The future prospects for emotional family stability are also dimmed by Suzanne's indication that Mary should know lesbians, homosexuals and transsexuals and "be a part of their lives" if "they are my [Suzanne's] friends." Suzanne, who admitted that many of her friends are to be found among the aforementioned groups, has thus postured herself in a position of recurring conflicts with the child's mother and the "traditional" upbringing enjoyed by Mary during her formative years. The resulting equation does not bode well for the emotional health and well-being of the child. This Court can perceive no basis for such disruption of Mary's life. Nor do we see the necessity for inflicting a continuing sense of instability and uneasiness on this child. As noted previously, when

Mary reaches the age of majority she can decide whether to reinstate a relationship with Suzanne. In the meantime, given the circumstances concerning Mary's view of Suzanne and the extent of her opposition to further ties with a vestigial parent, it can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.

In sum, the record discloses the fact that appellant has paid no support for over a year, and what little communication there was during this time may be appropriately described as "token." Moreover, the court concluded that termination of appellant's parental rights would be in Mary's best interest. We have determined that the trial court's findings and decision are clearly and convincingly supported by the evidence. Both the jurisdictional and dispositional requisites for the termination of appellant's rights as a parent have been satisfied.

The trial court had all the parties before it, observed their demeanor and weighed their credibility. In this area of such sensitivity, we must accord the lower court due deference. We have considered appellant's remaining contentions and conclude they either lack merit or do not require a reversal. Accordingly, we affirm the lower court's decision.

MOWBRAY, C.J., and YOUNG, J., concur.

GUNDERSON, J., with whom SPRINGER, J., concurs, dissenting:

The natural mother of Mary Toews Daly (Mary), Nan Toews Daly (Nan), filed a petition to terminate the parental rights of the natural father of Mary, who is now legally known as Suzanne Lindley Daly.[1] After a hearing, the district court terminated the father's parental rights over Mary. He then filed the instant appeal. We should reverse, because the district court lacked clear and convincing evidence which demonstrated the need to terminate parental rights over Mary. *At the outset, it should be emphasized that the father does not seek visitation rights at the present time. Hence, with all respect to my brethren in the majority, it seems inappropriate to bottom a ruling against*

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[1]The father's name formerly was Tim Daly. He changed his legal name to Suzanne Lindley Daly in December, 1982. In this opinion, to avoid confusion I shall refer to the parties as the "mother" and the "father."

The father was a transsexual. A transsexual, or a person with sexual dysphoria, is biologically the member of one gender while considering himself as a member of the other gender. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am.J.Psych. 692, 692 (1978). The medical profession does not know the etiology of transsexuality; however, a person's self-identification as a transsexual appears to occur early in life, probably by the age of four, but might even occur prenatally. *See* Doe v. McConn, 489 F.Supp. 76, 78 (S.D. Tex. 1980); M.T. v. J.T., 355 A.2d 204, 205 (N.J. Super.Ct.App.Div. 1976). Currently, psychotherapy appears to be an ineffective treatment for transsexuality *See* Doe v. Department of Pub. Welfare, 257 N.W.2d 816, 819 (Minn. 1977). According to Ira Pauly, M.D., a psychiatrist and expert in transsexuality, who testified at trial, the medical profession believes that sex reassignment surgery is the best treatment available for a transsexual. For further information on transsexuality, see Comment, M.T. v. J.T.: *An Enlightened Perspective on Transsexualism*, 6 Cap.L. Rev. 403, 403-10 (1976-1977); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn.L.Rev. 288, 288-94 (1974-1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L.Rev 963, 965-72 (1970-1971).

him on the supposition that visitation with him could injure Mary.

I

The parties were married in 1969. Their daughter, Mary, was born in August, 1973. By 1979, they had separated. After the separation, the mother worked and resided with Mary in Reno. The father lived in Oakland, California, where he worked at the Lawrence Berkeley Laboratory, a part of the University of California. A final divorce decree was entered on February 17, 1981, in our Second Judicial District Court. Under the decree, the mother received custody of Mary. The father received visitation privileges; he also was required to provide child support and health insurance for Mary.

In 1983, the mother petitioned the court to terminate her former husband's parental rights. The key issue underlying her petition appears to be his transsexuality. Prior to the 1981 medical diagnosis that the father was a transsexual, he had led a seemingly normal life. After high school, he received an appointment to the United States Naval Academy; however, he was unable to attend Annapolis because of poor eyesight. Instead, he enlisted in the United States Army and served honorably. Upon discharge, he attended the University of California at Berkeley. While at Berkeley, he worked at the Lawrence Berkeley Laboratory and double majored in Anthropolgy and in Slavic Language and Literature. After graduation, he continued to work for the Lawrence Berkeley Laboratory. His job, as a scientific research specialist, requires him to design

and build complex research equipment and experimental devices. The parties also started to raise a family.

After their separation, the father had doubts about his gender identity. He consulted with Lynn Frazier, Ph.D., a psychotherapist specializing in the treatment of transsexuals. Dr. Frazier evaluated him for a potential gender identity problem and, using medical guidelines for the diagnosis of transsexuals, Dr. Frazier diagnosed him as a transsexual. Following Dr. Frazier's advice, the father then entered into the preoperative treatment regimen prescribed for transsexuals.

At the termination hearing, Ira Pauly, M.D., a psychiatrist and recognized expert in the field of transsexualism testified about the standards employed to screen candidates for sex reassignment surgery. Those require the candidate to undergo at least six months of psychological evaluation, to undergo a full year of hormonal therapy which allows the candidate to develop the secondary sexual characteristics of the opposite gender, and to undergo the "real life test" which requires the candidate to dress and act as a member of the opposite gender. According to Dr. Pauly, the length and depth of these tests permit the medical professionals evaluating the candidate to determine if he is psychologically prepared to live the remainder of his life as a member of the other gender. The testing also permits the candidate to decide whether he wants to go through the sex reassignment surgery. When the father completed the evaluation phase, Dr. Frazier decided that he was a proper candidate for the surgical phase of the treatment. The surgery was then performed.

In 1981, after having been evaluated as a legitimate candidate[2] for sex reassignment surgery, the father revealed to his daughter that he had been diagnosed as a transsexual, and that his doctors had advised him to undergo sex reassignment therapy. Seeking to prepare her, he discussed with Mary what transsexuality is and what was going to happen to him. Mary, a bright child, apparently developed a reasonable understanding of what he explained to her. Before Mary returned to her mother, the father asked her to keep information secret from her mother; for he believed, correctly as matters turned out, that the mother would seek to use the information against him.

In February of 1982, Mary informed her mother that her father was a transsexual. Upon hearing this disclosure, the mother claimed to be worried about Mary's condition. After Mary had returned from her visit to Tim during the summer of 1981, the mother, in hindsight, thought that Mary had been quieter than normal. However, prior to the disclosure, it appears the mother had no special concerns over Mary's behavior. In addition, a neighbor and school teacher, both of whom knew Mary, did not notice any particular problems with Mary during this period either.

To resolve her concerns, the mother consulted a lawyer and had Mary visit a psychologist. As a result of these

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[2]Dr. Pauly stated, for example, that homosexuals are not appropriate candidates for sex reassignment surgery because, unlike a transsexual who does not accept his biological gender, a homosexual accepts his biological gender and thus does not require this surgery.

discussions, the mother unilaterally decided to deny the father visitation privileges, in violation of the divorce decree. Soon after the mother had made that decision, the father attempted to visit Mary in Reno. However, the mother, using the pretext of a nonexistent court order, had two sheriff's deputies intercept and deter the father before he was able to visit with Mary. Then, in August of 1982, the mother refused to pick up the father's birthday present for Mary at the post office. She also requested him to not telephone their residence.

Once again, in January of 1983, the father was barred from contacting Mary based upon the mother's assertion of another nonexistent court order. Later that day, he attempted to visit Mary at home; however, he was deterred by Mary's gun-wielding grandmother, who would not permit him to enter the premises.

After this incident, the mother sought and received a restraining order prohibiting the father from contacting Mary. She then initiated the instant proceedings to terminate his parental rights. At the termination hearing, both parties testified. Expert testimony was also provided on transsexuality, on the father's medical treatment for transsexuality, and on Mary's psychological condition.

The district court then terminated the father's parental rights. In reaching its decision, the district court basically concluded that Mary would be better off if she did not visit him. The court reached this conclusion based upon its evaluation of the father's emotional stability and upon the potential influence of his friends on Mary. The district court also noted that his "selfishness" did not serve Mary's interests. In addition, the district court found that he had failed to support Mary.

II

Termination of parental rights is governed by NRS 128.005 *et seq.* The grounds for termination of parental rights applicable to the father are listed in NRS 128.105-.107. Beyond the statutes, in reviewing a termination order, we look (1) for the existence of jurisdictional grounds, concerning a parent's conduct or capacity to raise a child, which fall below minimum standards, and (2) for the existence of dispositional grounds, concerning the child's interests, which require that the parental rights be terminated. Champagne v. Welfare Division, 100 Nev. 640, 647, 691 P.2d 849 (1984). To affirm a termination order, both types of grounds must exist. *Id.* at 640, 691 P.2d 849 (1982). I turn, therefore, to consider application of the *Champagne* test to the district court's order.[3]

A

The district court identified several jurisdictional grounds. First, the district court noted that the father had abandoned Mary because of a lack of support and communication over a period of six months or longer. *See* NRS 128.105(1), (5)(a). The mother, however, played an instrumental role in inhibiting contacts with Mary, and manipulated sheriff's deputies and school officials to obstruct attempted visits. Considering these facts and others,

---

[3]In applying *Champagne* to the district court's findings, I characterize the court's pre-*Champagne* decision in terms of *Champagne's* jurisdictional and dispositional categories. *See* e.g., McGuire v. Welfare Division, 101 Nev. 179, 180-81, 697 P.2d 479 (1985).

we cannot properly ignore the obstacles the mother placed in the father's way.[4] *See in re* Adoption of Doe, 677 P.2d 1070, 1074 (N.M.Ct.App.), *cert. denied*, 677 P.2d 624 (N.M. 1984). Despite such barriers, the father continued to maintain medical insurance for Mary. Unlike the case of *Pyborn v. Quathamer*, where no "real attempt" to communicate or to support the child occurred, 96 Nev. 145, 146, 607 P.2d 1141 (1980), he attempted to visit Mary, attempted to communicate with Mary, and did help support Mary. There is thus no clear and convincing showing of a conscious abandonment of Mary. *E.g., In re* Appeal in Maricopa County, Juvenile Action No. JS-3594, 653 P.2d 39, 43-44 (Ariz.Ct.App. 1982); *In re* Appeal in Pima County, Juvenile Action No. S-624, 616 P.2d 948, 950 (Ariz.Ct.App. 1980). Therefore, this jurisdictional ground fails.

The district court also found that Mary faced a risk of serious physical, emotional or mental injury *if the father exercises any parental rights.* However, without the exercise of visitation rights, which he is voluntarily foregoing, such injury admittedly cannot occur. Thus, this jurisdictional ground fails also.

Finally, the district court found that the father's selfishness, his unrealistic thinking about Mary, and his lifestyle adversely affect his ability to be a parent. Because he does not ask to exercise visitation rights, however, these considerations do not currently affect Mary's life.

---

[4]We further note that the father was attempting to regain visitation rights during this same period; he was hindered by counsel who evidently did not expeditiously aid his cause. Where a parent attempts through an attorney to regain his rights, we obviously should not hold that he has abandoned his child merely because of the seemingly ineffective assistance of counsel.

Therefore, the jurisdictional grounds invoked by the district court fail to provide an adequate basis to terminate the father's parental rights.

B

The district court also found several categories of dispositional grounds. The district court noted that Mary should not be around someone with a gender identity problem, should not be in an environment where she might confront sexual minorities, and does not presently wish to be with her father. Again, without visitation, none of these concerns have substance. Therefore, this first category of dispositional grounds fails to justify a termination of the father's parental rights.

The second category of dispositional grounds raised by the district court concerned Mary's anxieties over the dispute between her parents. Yet, no judicial resolution of the instant appeal can stop any hostilities that exist between the parties. With the father foregoing any contact with Mary, little else can be done to resolve Mary's anxieties. Thus, this dispositional ground fails to justify a termination of all parental rights.

Finally, the district court noted that Mary does not now desire to be with appellant and believes he is no longer her father. I recognize the importance of considering a child's views of her parents where the child can sufficiently articulate her desires. NRS 128.107(2). Still, we also should recognize the importance of not severing a parent's rights where a less restrictive alternative exists to permit preservation of a family tie. *E.g., In re* Brooks, 618 P.2d 814, 822 (Kan. 1980). While Mary may no longer have a father figure, she still has a second parent who

desires to contribute to her financial support, and who might someday in the future provide her with needed comfort, affection, and help.

III

In conclusion, I reiterate that Mary and her father currently are totally separated, for he is willing to forego visitation rights at present, in order to maintain his legal status as Mary's parent. This separation protects Mary from all of the concerns, imagined or real, which underlay the district court's termination of parental rights.

A close reading of the majority opinion simply underscores this fundamental point. In attempting to justify the district court's ruling, the majority recite, *inter alia:* "The district court primarily focused upon the risk of serious physical, mental or emotional injury to the child *if visitation were resumed and the child were forced to maintain contact with appellant.*" (Emphasis added.) The majority also state: "At trial Dr. Weiheir, respondent's expert witness who examined Mary, testified that there is a serious risk of emotional or mental injury to the child *if she were allowed to be in her father's presence.*" (Emphasis added.) Again, the majority point out: "Dr. Weiheir, however, had the opportunity to observe and interview Mary and determined the risk to Mary would exist *only if visitation were forced upon Mary.* (Emphasis added.) The majority go on to assert: "Nevertheless, *if visitation were permitted*, there would be a risk of serious maladjustment, mental or emotional injury." (Emphasis added.) Hence, it is to be seen that the majority opinion is premised, not upon fact, but upon suppositions

which are contrary to the facts and which ignore the appellant father's basic legal position.

As previously noted, the appellant father in this matter is a well educated person, long employed by one of this nation's eminent academic institutions. He served this country honorably in its armed forces, and the record indicates, has never been known to violate any of our country's laws. Appellant fathered Mary Daly in wedlock, and, since divorce, has maintained an interest in her and has continued attempts to provide for her, even though the respondent has improperly impeded those legitimate efforts.

In psychological distress, the father has consulted legitimate and respected medical authorities. The advice given by those medical authorities may offend the religious precepts of many. In the ultimate judgment of history, such advice may well yet be condemned as quackery. Still, I respectfully submit that a court of law should not stigmatize an emotionally distressed person for following the advice of highly trained and licensed physicians, who are practicing medicine under government authority, and who possess the most exalted credentials their profession can bestow. Nor should any parent be stigmatized for attempting to forewarn a child concerning medical procedures the parent is about to undergo pursuant to such advice.

Recognizing that the medical procedures he has undergone currently occasion distress to her child, the father does not contend he should now be allowed visitation rights. Rather, he contends merely that he has done nothing to warrant severing his formal legal parental tie to Mary Daly, apparently hoping that the passage of time will re-

store in Mary a desire to know him. In the meantime, the father recognizes, he would have to accept the duty of contributing to Mary's support, while foregoing visitation with the child.

As I assess the record, the fact that the appellant father has suffered emotional problems which are foreign to the experience of this court's members, and has followed the possibly poor advice of eminent medical authorities in his attempt to relieve them, does not justify a total and irrevocable severance of appellant's formal legal tie to a child he obviously cares about and desires to help nurture. By holding that such a severance is justified in these facts, it seems to me, we are being unnecessarily and impermissibly punitive to the exercise of a medical option we personally find offensive, thereby depriving a child of a legal relationship which might well be to the child's advantage in the future.

Case No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS
AS TO MARY TOEWS DALY, a minor child.

DECISION

(Filed April 11, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, Nada Novakovich. Respondent, natural father, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, Susan J. Haveson, Ellen LaCroix and Ann Casamajor. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

The Court deeming itself fully advised in the premises finds and concludes as follows:

Petitioner is the natural mother of the minor child, Mary Toews Daly, born on August 21, 1983, and Respondent is the natural father of the child. The Respondent is a preoperative male-to-female transsexual, presently living full time as a woman. On December 9, 1982, Respondent changed, by Court Order, from Tim Daly to Suzanne Lindley Daly.

A Decree of Divorce was entered in this Court on October 2, 1980, wherein physical custody of the child was awarded to the Petitioner with the Respondent retaining reasonable visitation rights as specified in the decree.

Respondent regularly exercised visitation rights as specified in the decree, seeing the child approximately one weekend per month, on alternate holidays and for one month in the summer.

While the child was with the Respondent in August of 1981, Respondent discussed her personal situation with the 8 year old child, explaining her feelings and intentions to be hormonally and surgically reassigned as a female.

Although Respondent and Mary agreed that the matter would be best concealed from the Petitioner, Mary was apparently induced to reveal her knowledge. From that point onward, Respondent has been denied any contact with Mary. Efforts to exercise visitation rights were frustrated. Respondent has not seen or heard from her child for over a year.

The Petitioner has filed this petition to permanently terminate Respondent's parental rights alleging unfitness under provisions of NRS 128.. et. seq.

This Court is fully aware of the seriousness and terrible finality of a decree terminating parental rights, and that such a remedy should be applied with caution. This Court having in mind at all times the polar start of termination proceedings is the best interests of this child only.

The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be termi-

nated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child. The overriding principle for the court to follow in evaluating the evidence is set forth in NRS 128.090:

> "... The court ..... shall in all cases require the petitioner to establish the facts and shall give full and careful consideration of all the evidence presented with due regard to rights and claims of the parent or parents of such person, and to any and all ties of blood or affection, but *with the dominant purpose of serving the best interests of such minor person.*" [emphasis added]

Chapter 128. NRS pertaining to termination of parental rights, Section 128.005 provides: "The legislature declares that the preservation and strengthening of family life is part of the public policy of this state." The legislature finds, in Section C that: "The continuing need of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."

One of the important single factors to be considered is the moral character and emotional stability of the Respondent, Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights.

Due to circumstances brought about by her own actions and conduct, Respondent Suzanne, to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the "best interests" of Mary to have parental rights as to her.

The decisive considerations are the continuing needs of the child for the proper physical, mental, and emotional growth and development.

Dr. Ira Pauly testified on behalf of the Respondent and summarized this case when he said, "we are treading on thin ice."

We are dealing with the life and mind of a 9 year old girl. And the Court must determine what is in her best interests. She is a healthy happy little girl living with her mother and grandmother, and is gifted with a brilliant future ahead of her. She is well adjusted and relates well to people, to her teacher, to her peers and to her friends.

Nevada Revised Statutes provide for termination of parental rights in any one of three instances, i.e., abondonment, neglect, and unfitness. The element of nonsupport is present and can be one of the elements.

NRS 128.105 generally provides that there can be termination to eliminate the risk of serious physical, mental or emotional injury to the child. If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not the best interests of the child or for the child's welfare.

The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visitation, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by

society. The Court finds that Mary is under emotional distress over this situation at this time.

The Court is of the opinion that Respondent is a selfish person to his own needs, his own desires, his own wishes, and is not thinking in a realistic way about Mary.

Respondent Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that Respondent Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a "gender identity" problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional.

Also, the Court is mindful of the distressing situation which exists between Respondent and his former wife, the Petitioner, which permeated the entire proceedings. The Court is also mindful that hostility and alienation, originating with the custodial, nontranssexual parent, are common and frequently result in a poisoning of the relationship between the transsexual parent and the child. It appears to this Court that the situation here is *not resolvable* without hurting Mary deeply.

If the Court does not terminate the parental rights of Respondent, the Daly's are going to be faced with multiple problems. There is a serious risk of physical, mental and emotional harm to this child should we take a chance. The Court must face reality in this situation.

In chambers with the Court and attorneys, the child generally stated that she did not want to be with her father and that he does not exist anymore.

The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.

There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.

The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding, is not to the advantage of this child.

LET JUDGMENT BE ENTERED TERMINATING Respondent's Parental rights as to Mary Toews Daly in accordance with the foregoing and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

Counsel for the Petitioner is requested to prepare formal Findings of Fact, Conclusions of Law and Judgment accordingly and present same to the Court for signature and filing at her earliest convenience.

DATED: This 11th day of April, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATION OF DELIVERY OF A COPY

The undersigned hereby certifies that on the 12th day of April, 1983, she mailed a copy of the attached Decision to the following:

Nada Novakovich
Attorney at Law
50 West Liberty St.
Suite 650
Reno, NV 89501

Susan J. Haveson
Attorney at Law
330 East Liberty St.
Suite 200
Reno, NV 89501

Ellen LaCroix
Attorney at Law
P.O. Box 3286
Berkeley, CA 94703

Ann Casamajor
Attorney at Law
% Ellen LaCroix
P.O. Box 3286
Berkeley, CA 94703

/s/ J. Spencer

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file, and of record in my office.

DATE: June 25, 1986

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By /s/ Rocasee, Deputy

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, a minor child,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 2, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, NADA NOVAKOVICH. Respondent, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, SUSAN J. HAVESON, ELLEN LaCROIX and ANN CASAMAJOR. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

The Court deeming itself fully advised in the premises finds and concludes as follows:

FINDINGS OF FACT

I.

Petitioner is the natural mother of the minor child, Mary Toews Daly, born on August 21, 1973, and Respon-

dent is the natural father of the child. The Respondent is a preoperative male-to-female transsexual, presently living full time as a woman. On December 9, 1982, Respondent changed, by Court Order, from Tim Daly to Suzanne Lindley Daly.

II.

A Decree of Divorce was entered in this Court on October 2, 1980, wherein physical custody of the child was awarded to the Petitioner with the Respondent retaining reasonable visitation rights as specified in the decree.

III.

Respondent regularly exercised visitation rights as specified in the decree, seeing the child approximately one weekend per month, on alternate holidays and for one month in the summer.

IV.

While the child was with the Respondent in August of 1981, Respondent discussed her personal situation with the 8 year old child, explaining her feelings and intentions to be hormonally and surgically reassigned as a female.

V.

Although Respondent and Mary agreed that the matter would be best concealed from the Petitioner, Mary was apparently induced to reveal her knowledge. From that point onward, Respondent has been denied any contact with Mary. Efforts to exercise visitation rights were

frustrated. Respondent has not seen or heard from her child for over a year.

VI.

The Petitioner has filed this Petition to permanently terminate Respondent's parental rights alleging unfitness under provisions of NRS 128, et. seq.

VII.

This Court is fully aware of the seriousness and terrible finality of a decree terminating parental rights, and that such a remedy should be applied with caution. This Court having in mind at all times the polar star of termination proceedings is in the best interests of this child only.

VIII.

The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be terminated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child. The overriding principle for the Court to follow in evaluating the evidence is set forth in NRS 128.090:

> "... The court ..... shall in all cases require the petitioner to establish the facts and shall give full and careful consideration of all the evidence presented with due regard to rights and claims of the parent or parents of such person, and to any and all ties of blood or affection, but *with the dominant purpose of serving the best interests of such minor person.*" [emphasis added]

Chapter 128. NRS pertaining to termination of parental rights, Section 128.005 provides: "The legislature declares that the preservation and strengthening of family life is part of the public policy of this state." The legislature finds, in Section C, that: "The continuing need of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."

IX.

One of the important single factors to be considered is the moral character and emotional stability of the Respondent, Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights.

X.

Due to circumstances brought about by her own actions and conduct, Respondent Suzanne, to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the "best interests" of Mary to have parental rights as to her.

XI.

The decisive considerations are the continuing needs of the child for the proper physical, mental and emotional growth and development.

XII.

Dr. Ira Pauly testified on behalf of the Respondent and summarized this case when he said, "we are treading on thin ice."

XIII.

We are dealing with the life and mind of a 9 year old girl. And the Court must determine what is in her best interests. She is a healthy, happy little girl living with her mother and grandmother, and is gifted with a brilliant future ahead of her. She is well-adjusted and relates well to people, to her teacher, to her peers and to her friends.

XIV.

Nevada Revised Statutes provide for termination of parental rights in any one of three instances, i.e., abandonment, neglect, and unfitness. The element of non-support is present and can be one of the elements.

XV.

NRS 128.105 generally provides that there can be termination to eliminate the risk of serious physical, mental or emotional injury to the child. If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare.

XVI.

The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visita-

tion, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by society. The Court finds that Mary is under emotional distress over this situation at this time.

XVII.

The Court is of the opinion that Respondent is a selfish person to his own needs, his own desires, his own wishes, and is not thinking in a realistic way about Mary.

XVIII.

Respondent Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that Respondent Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a "gender identity" problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional.

XIX.

Also, the Court is mindful of the distressing situation which exists between Respondent and his former wife, the Petitioner, which permeated the entire proceedings. The Court is also mindful that hostility and alienation, originating with the custodial, non-transsexual parent, are common and frequently result in a poisoning of the relationship between the transsexual parent and the child.

It appears to this Court that the situation here is *not resolvable* without hurting Mary deeply.

XX.

If the Court does not terminate the parental rights of Respondent, the Dalys are going to be faced with multiple problems. There is a serious risk of physical, mental and emotional harm to this child should we take a chance. The Court must face reality in this situation.

XXI.

In chambers with the Court and attorneys, the child generally stated that she did not want to be with her father and that he does not exist anymore.

XXII.

The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.

XXIII.

There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.

XXIV.

The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and

impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding is not to the advantage of this child.

CONCLUSIONS OF LAW

From the foregoing facts, Court concludes that a judgment be entered terminating the parental rights of TIMOTHY MARK DALY, a/k/a/ SUZANNE LINDLEY DALY, as to MARY TOEWS DALY in accordance with the foregoing and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

Let judgment be entered accordingly.

DATED: This 2nd day of May, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFIED COPY

The document to which this certificate is attached is a full true and correct copy of the original on file, and of record in my office.

DATED: June 25, 1986.

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe. State of Nevada.

/s/ J. Rocasee, Deputy

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS
AS TO MARY TOEWS DALY, a minor child.

JUDGMENT AND DECREE

(Filed May 2, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, NADA NOVAKOVICH. Respondent, natural father, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, SUSAN J. HAVESON, ELLEN LaCROIX and ANN CASAMAJOR. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parental rights of Timothy Mark Daly, also known as Suzanne Lindley Daly, as to Mary Toews Daly are terminated in accordance with the decision of the Court and Findings of Fact and Conclusions of Law filed herein and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

DATED this 2nd day of May, 1983.

/s/ John E. Gabrielli
District Judge
Recorded Judgment Docket
Book A-46 Page D-9
Judi Bailey, Clerk
By L. Snow, Deputy

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file, and of record in my office.

DATE: June 25, 1986.

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By /s/ Rocasee, Deputy

128.012 "Abandonment of a child" defined.

1. "Abandonment of a child" means any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child.

2. If a parent or parents of a child leave the child in the care and custody of another without provision for his support and without communication for a period of 6 months, or if the child is left under such circumstances that the identity of the parents is unknown and cannot be ascertained despite diligent searching, and the parents do not come forward to claim the child within 3 months after he is found, the parent or parents are presumed to have intended to abandon the child.

(Added to NRS by 1975, 963; A 1981, 1753)

128.015 "Parent and child relationship," "parent" defined.

1. "Parent and child relationship" includes all rights, privileges and obligations existing between parent and child, including rights of inheritance.

2. As used in this section, "parent" includes an adoptive parent.

(Added to NRS by 1975, 964)

128.018 "Unfit parent" defined. "Unfit parent" is any parent of a child who, by reason of his fault or habit

or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support.

(Added to NRS by 1975, 964; A 1981, 1753)

128.090 Hearing; evidence and postponement.

1. At the time stated in the notice, or at the earliest time thereafter to which the hearing may be postponed, the court shall proceed to hear the petition.

2. The proceedings are civil in nature and are governed by the Nevada Rules of Civil Procedure. The court shall in all cases require the petitioner to establish the facts and shall give full and careful consideration to all of the evidence presented, with due regard to the rights and claims of the parent or parents of the child and to any and all ties of blood or affection, but with a dominant purpose of serving the best interests of the child.

3. The standard of proof to be adduced in the proceedings is a preponderance of the evidence.

4. Information contained in a report filed pursuant to NRS 200.501 to 200.509, inclusive, may not be excluded from the proceeding by the invoking of any privilege.

5. In the event of postponement, all persons served, who are not present or represented in court at the time of the postponement, must be notified thereof in the manner provided by the Nevada Rules of Civil Procedure.

[9:161:1953]—(NRS A 1969, 95; 1981, 1754)

128.105 Grounds for terminating parental rights: Basic considerations. An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106 to 128.108, inclusive:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent;

(d) To eliminate the risk of serious physical, mental or emotional injury to the child; or

6. With respect to termination of the parental rights of one parent, the abandonment by that parent.

(Added to NRS by 1975, 964; A 1981, 1755)

128.106 Specific considerations in determining neglect by or unfitness of parent. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:

1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.

2. Conduct toward a child of a physically, emotionally or sexually cruel or abusive nature.

3. Excessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child.

4. Repeated or continuous failure by the parent or parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for his physical, mental and emotional health and development, but a person who, legitimately practicing his religious beliefs, does not provide specified medical treatment for a child is not for that reason alone a negligent parent.

5. Conviction of the parent or parents for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent or parents to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

6. Unexplained injury or death of a sibling of the child.

7. Inability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies.

(Added to NRS by 1981, 1751)

128.108 Specific considerations where child has been placed in foster home. If a child is in the custody of a public or private agency and has been placed and resides in a foster home and the custodial agency institutes proceedings pursuant to this chapter regarding the child, with an ultimate goal of having the child's foster parent or parents adopt him, the court shall consider whether the child has become integrated into the foster family to the extent that his familial identity is with that family, and whether the foster family is able and willing permanently to treat the child as a member of the family. The court shall consider, without limitation:

1. The love, affection and other emotional ties existing between the child and the parents, and the child's ties with the foster family.

2. The capacity and disposition of the child's parents from whom the child was removed as compared with that of the foster family to give the child love, affection and guidance and to continue the education of the child.

3. The capacity and disposition of the parents from whom the child was removed as compared with that of the foster family to provide the child with food, clothing and medical care and to meet other physical, mental and emotional needs of the child.

4. The length of time the child has lived in a stable, satisfactory foster home and the desirability of his continuing to live in that environment.

5. The permanence as a family unit of the foster family.

6. The moral fitness, physical and mental health of the parents from whom the child was removed as compared with that of the foster family.

7. The experiences of the child in the home, school and community, both when with the parents from whom he was removed and when with the foster family.

8. Any other factor considered by the court to be relevant to a particular placement of the child.

(Added to NRS by 1981, 1752)

128.120 Effect of order. Any order made and entered by the court under the provisions of NRS 128.110 is conclusive and binding upon the person declared to be free from the custody and control of his parent or parents, and upon all other persons who have been served with notice by publication or otherwise, as provided by this chapter. After the making of the order, the court has no power to set aside, change or modify it, but nothing in this chapter impairs the right of appeal.

[12:161:1953]—(NRS A 1981, 1756)

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, A minor child.

AFFIDAVIT

(Filed February 10, 1983)

NAN TOEWS DALY, being first duly sworn, deposes and says:

That she is the Petitioner in the above referenced matter and the natural mother of the minor child, namely, MARY TOEWS DALY.

That on the 31st day of January, 1983 TIM DALY, also known as TIMOTHY MARK DALY, along with his attorney, went to the grammar school where the said child is attending school to attempt to make contact with the child, and again to make contact with the child at the school bus depot.

Petitioner believes that TIM DALY, also known as TIMOTHY MARK DALY, is attempting to take the child from the jurisdiction of this Court which will jeopardize the child's welfare; that the said TIM DALY, also known as TIMOTHY MARK DALY, is a transsexual by his own admission and that there is a risk of serious physical, mental or emotional injury to the child if the said TIM DALY, also known as TIMOTHY MARK DALY, obtains custody of the child in any manner.

WHEREFORE, the Petitioner prays that this Court issue a Restraining Order restraining TIM DALY, also known as TIMOTHY MARK DALY, from contacting, communicating with, or removing the child from the jurisdiction of this Court during the pendency of this action.

DATED this 3rd day of February, 1983.

/s/ Nan Toews Daly

SUBSCRIBED and SWORN to before me
this 3rd day of February, 1983.

/s/ Ruth L. Brockway
Notary Public

SEAL

RUTH L. BROCKWAY
Notary Public—State of Nevada
Washoe County
My Appointment Expires Aug. 24, 1984.

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY
A minor child.

RESTRAINING ORDER

Upon reading the verified affidavit of NAN TOEWS DALY, Petitioner in the above entitled matter and good cause appearing therefor,

IT IS HEREBY ORDERED that TIM DALY, also known as TIMOTHY MARK DALY, is restrained from contacting, communicating with, or removing the minor child, MARY TOEWS DALY, from the jurisdiction of this Court during the pendency of this action.

DATED this 9th day of February, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5 (b), I certify that I am an employee of NADA NOVAKOVICH, Attorney at Law, and that this day I deposited for mailing at Reno, Nevada, a true copy of the foregoing Restraining Order addressed to:

Susan J. Haveson
320 East Liberty Street
Suite 200
Reno, Nevada 89501

DATED this 11th day of February, 1983.

/s/ Ruth L. Brockway

Case No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, a minor child.

ORDER

(Filed December 7, 1983)

Petitioner Nan Toews Daly's Motion to Dismiss Appeal, filed October 11, 1983, was submitted to the Court for decision on November 22, 1983, pursuant to WDCR 11, upon the motion, legal points and authorities in support thereof, and upon Respondent/Appellant's filing of Notice of Filing of Cash Deposit in Lieu of Bond for Costs on Appeal, filed November 21, 1983, Designation of Record on Appeal, filed November 21, 1983, and attached letter to the Court from Ann Casamajor, former attorney for Respondent/Appellant, Suzanne Lindley Daly, who is assisting Respondent/Appellant in the matter of filing these papers in Propria Persona, all the pleadings and proceedings heretofore had in this case, and the entire file.

The Court deeming itself fully advised in the premises finds and concludes that the Petitioner's Motion to Dismiss Appeal should be denied because it is this Court's considered opinion and general practice not to dismiss any party's appeal to the Supreme Court for technical procedural grounds and this Court is of the opinion that the Supreme Court should make this decision in this instance

for the best interests of the administration of justice in this State.

IT IS SO ORDERED.

DATED: This 7th day of December, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATION OF DELIVERY OF A COPY

The undersigned hereby certifies that on the 8th day of December, 1983, she mailed a copy of the attached Order and Letter to the following:

Nada Novakovich
Attorney at Law
P.O. Box 2473
Reno, NV 89505

Suzanne Lindley Daly
2545 Wallace Street
Oakland, CA 94606

Ann Casamajor
Attorney at Law
P.O. Box 6246
Albany, CA 94706

/s/ J. Spencer

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CASE NUMBER 15423

SUZANNE LINDLEY DALY,
formerly known as
TIM DALY,

Appellant,

vs.

NAN TOEWS DALY,

Respondent.

APPELLANT'S OPENING BRIEF

ANN CASAMAJOR
Attorney at Law
P.O. Box 6246
Albany, CA 94706
(415) 527-7130

LAWRENCE J. SEMENZA
SARAH BETH BROWN
SEMENZA & BROWN
P.O. Box 7823
Reno, NV 89510

Attorneys for Appellant

NADA NOVAKOVICH
P.O. Box 2473
Reno, NV 89505

Attorney for Respondent

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ISSUES ON APPEAL

I. DID THE TRIAL COURT HAVE JURISDICTION TO SUPERSEDE A FINAL DECREE OF DISSOLUTION SETTLING PARENTAL RIGHTS?

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III. WAS THE STANDARD OF PROOF CONSTITUTIONALLY ADEQUATE?

IV. IS THE DECREE TERMINATING PARENTAL RIGHTS SUPPORTED BY SUBSTANTIAL EVIDENCE?

* * *

II. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW IN TERMINATING HER PARENTAL RIGHTS.

A. Procedural Due Process.

1. *An action for termination of parental rights is quasi-criminal.*

Santosky v. Kramer (1982) 455 US 745:

> " . . . the factfinding stage of a . . . permanent neglect proceeding bears many of the indicia of a criminal trial" 455 US at 762

The instant action was in effect a criminal action brought by a private party, the absurdity of which is plain. The pleading was accusatory, not compensatory in the civil sense or declaratory in the domestic sense; it sought solely to establish that Appellant had done some act or acts which entitled the state to restrain her fundamental rights. It sought as relief not the compensation of a plaintiff or the dissolution of previously shared rights and obligations, but punishment for wrongdoing, a punishment the United States Supreme Court has recently judged " 'as great [as],

if not greater, than a criminal penalty . . .' ". *Santosky v. Kramer, supra* at 455 US 769. This is capital punishment of a parent's soul for the crime of being different.

2. *Appellant was denied effective counsel at critical stages of the termination proceedings.*

A very recent United States Supreme Court decision has established standards for effectiveness of counsel which are applicable herein. *Strickland v. Washington* (May 14, 1984) 44 CCH SCT Bull B 2512, 52 USLW 4565 set forth the following criterion:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 44 CCH SCT Bull B 2538

The application is simple: had attorney Haveson not submitted Appellant to the jurisdiction of the termination court, it could not have proceeded. Not only was there a reasonable probability that the result would have been different, there would have been no action in which to terminate Appellant's parental rights, but for the betrayal of counsel at the threshold of amenability to Nevada adjudication.

Further evidence of attorney Haveson's neglect lies in the belated motion for a mental examination (CI 16-17). What was the point of an examination on the eve of trial? It would be difficult at best to allow time for a decision on the motion, let alone meaningful examination and report before the hearing; the horse had long since departed and there was no point in closing the barn door.

Appellant and her California attorneys, then, went to trial with jurisdictional defects waived, no discovery, and

a mandatory local counsel whose ineffectiveness not only prejudiced Appellant's case, but required that a case be presented at all.

The trial court noted attorney Lacroix' inexperience (RT 3:8-29) and specifically requested that attorney Haveson remain at the hearing. The failure of either the inexperienced Lacroix or the indifferent Haveson to object to Respondent's sweeping statement that she had "hit all the grounds in the statute" (RT 2:14-28) opened the proceeding to unpleaded grounds. (CI 1-4). Respondent pleaded only unfitness and risk of harm, yet repeatedly invoked the grounds of neglect and abandonment (RT 2:14-17; 17:17-24; 26:28-28:4; 308:29-313:15; 327:12-333:25; 357:8-359:10). The court's vague reference to non-support (CI 51:15-16) shows the confusion caused by inattention to the scope of the pleadings.

3. *The restraining order signed by the trial court violated Appellant's rights to notice and opportunity to be heard.*

In response to Appellant's effort to contact her child at school, (RT 140:22-141:16), the trial court granted unnoticed *ex parte restraint* to Respondent (CI 1-12) upon a ludicrous "affidavit" (CI 13-14) which was unserved and unfiled. *Rule 65, Nevada Rules of Civil Procedure*, sets forth stringent notice, scope, and duration requirements for restraining orders:

> a. NRCP 65(b) requires that: (1) irreparable harm will clearly occur unless immediate action is taken; (2) applicant's attorney must certify in writing the efforts made to provide notice; the order note the hour and date of rendition, be filed with the clerk, and expire in 15 days; hearing on preliminary injunction

be held as soon as possible or the restraining order be dissolved;

b. NRCP 65(c) requires security for costs to a to a party wrongfully restrained;

c. NRCP 65(d) requires specificity in the restraining order as to reasons for issuance other than by reference to pleadings or other documents;

d. NRCP 65(f) exempts "suits for divorce . . . or custody of children"; orders in such cases need only be "just".

If the termination action was a "suit . . . for . . . custody of children", the UCCJA applied. NRS 125A.040; the UCCJA was ignored here.

This court, in *Turner v. Saka* (1974) 90 Nev. 54, 518 P2d 608, found unnoticed restraint unreasonable and unjust:

"'. . . any . . . motion involving judicial discretion that affects the rights of another . . . must be made on notice even where no rule expressly requires notice to obtain the particular order sought, except only when this requirement is altered to meet extraordinary situations such as those concerned in NRCP 65(b) . . . although an order's subject matter would lie within the court's jurisdiction if properly applied for, it is void if entered without the required notice . . . it makes no difference that a void order may concern a matter committed to the court's discretion . . . regarding which the court might have granted protective orders had a proper application been made."

518 P2d at 613

"Although NRCP 65(f) may be read to envision somewhat greater flexibility and less formality in domestic matters than in other litigation, still we do not read it as dispensing with the requirement that there be either notice or a showing of necessity befor [sic] existing

custody rights are disturbed. An order entered without one or the other simply is not "just".

id. at 614

The *Turner* court then considered the contents of the "Verified Complaint" and affidavits by which Saka obtained the order, concluding they were devoid of specific facts establishing a need for immediate relief. Although the documents "attempted to show Mrs. Turner was of poor character", this court was not persuaded:

". . . the creative prose of counsel fell short of establishing such an emergency . . ."

id. at 614

Respondent's supporting papers were even worse. (CI 1-2; 13-14). The vague allegations of the "affidavit" (CI 13-14) are post-decree boilerplate. In *Matter of Lemond* (Ind 1980) 413 NE2d 228, 239, a noncustodial father, after years of hearings and appeals, sought temporary restraint under child protection statutes upon allegations of: (1) child hated and feared other parent, would not return to her; (2) other parent caused severe emotional distress; (3) other parent did not provide a fit environment; (4) child would be taken from the jurisdiction. 413 NE 2d at 239, fn 12. As a study in parental mendacity alone, *Lemond* bears reading.

Here, the restraining order was never regularly filed (see face of CI 11 and notiation at Page 3, Line 21 of CI), nor was it served other than by mailing it across town to attorney Haveson, who received it February 14, 1983, two weeks after the incident which provoked it. *District Court Rule 24* requires prompt filing of orders.

A temporary restraint of Appellant's fundamental parental rights is nevertheless a violation of due process:

> " '[I]t is now well settled that a temporary, nonfinal deprivation . . . is nonetheless 'deprivation' in the terms of the Fourteenth Amendment' "
>
> *Turner v. Saka, supra,* 518 P2d at 613 (quoting *Fuentes v. Shevin* (1972) 407 US 67)

At the time the trial court restrained Appellant, the unmodified decree still provided for visitation (RT 289:10-294:23); which proceeding is to control such a situation?

4. The closure of the hearing was error under rules of court, applicable statute, and constitutional rights of public trial.

Over Appellant's objection and on Respondent's motion, the trial court closed the hearing to the public, including an associate of attorney Lacroix who was present as an observer. (RT 6:13-8:2). This was plain error under the rules of court and applicable statute and allowed court and counsel a free hand to divert the course of justice at will, even prejudicing this court's effective review of the hearing.

Rule 77(b), NRCP:

> "(b) Trials and Hearings; Orders in Chambers. All trials on the merits shall be conducted in open court and so far as convenient in a regular court room, except private trial may be had as provided by statute . . ."

NRS 125.080:

> "125.080 Trial of divorce action may be private. In any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private, and

> upon such direction all persons shall be excluded from the court or chambers wherein the action is tried, except the officers of the court, the parties and their witnesses and counsel."

Respondent, of course, did not proceed under Chapter 125, but under Chapter 128, which has no provision for private trial. Appellant argues that such a provision would be unconstitutional in a proceeding to terminate fundamental rights. This proceeding was quasi-criminal. The fact that the Legislature has chosen to designate it "civil" cannot change its function as an accustory action with a goal of punishment for wrongdoing. In discussing the standard of proof, the Supreme Court in *Santosky v. Kramer, supra,* noted:

> "Notwithstanding 'the state's "civil labels and good intentions" . . . the court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of . . . proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma' ".
>
> 455 US at 756

A very recent decision of the Third Circuit Court of Appeals addressed as an "issue of first impression . . . whether the First Amendment secures to the public . . . a right of access to civil proceedings." In *Publicker Industries, Inc. v. Cohen* (3rd cir, April 30, 1984) 52 USLW 2641, the court examined the bases of the United States Supreme Court's public-trial decisions and found them equally applicable to civil proceedings, concluding that access to the courts is a fundamental right requiring that a compelling state interest exist and be articulated by a court before closing proceedings. Such a closure must be narrowly tailored to serve such compelling interest and a transcript

is not always an adequate substitute for public scrutiny of the trial. The court's findings as to reasons for closure must appear in the record.

Here, an associate of attorney Lacroix was among those excluded upon Respondent's naked motion and the court's vague reference to the best interests of the child. The associate, mistakenly identified as Ms. Casamajor, was actually California attorney Deborah Arbuckle, who had accompanied the inexperienced Lacroix to assist in logistics and unforeseen research and investigation; with such a connection to the case, her exclusion is hardly a narrowly-drawn exercise of a compelling state interest in secrecy. The closure order left no witnesses to what was to transpire.

An earlier United States Supreme Court, in *In Re Oliver* (1942) 333 US 257, noted:

> "The . . . distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition . . . [and] the English Court of Star Chamber . . . these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each . . . had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits . . . [a public trial] may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."
>
> 333 US at 268

Appellant is not ashamed of her unavoidable medical condition, which she has bravely and intelligently overcome

to live her life with dignity and pride. The trial court cast stigma upon her by presuming sensational evidence was in the offing. This was not a sexual or child abuse case in any sense of the terms. No sexual conduct appears in the record, aside from the repeated vague and invidious innuendo of Respondent and her counsel. (RT 22:15-26; 24:30-25:17; 40:1-44:10; 44:27-45:5; 176:11-26; 177:6-178:4; 179:6-180:22; 181:27-182:16; 183:21-185:5; 286:19-287:23; 313:17-318:9; 324:20-326:26; 332:8-333:25; 335:8-10; 336:6-19; 360:9-28). Respondent made no direct inquiry into Appellant's sex life, if any, yet presumed from the outset that Appellant lived a notorious "lifestyle" of gross perversion.

Due process requires a fair, impartial, and public trial. Respondent stacked the deck in pretrial orders, then cleared the courtroom of those who would have been eyewitnesses to the abuses of counsel. Such a situation shocks the conscience and appalls the legal mind; it clearly offends the Constitution. The closure of the trial alone requires reversal. Kafka could write no crueler scenario; Torquemada could conduct no more thorough Inquisition. The Star Chamber has no place in an American justice system.

The United States Supreme Court has not been altogether silent on closed civil trials. In *Richmond Newspapers, Inc. v. Virginia* (1980) 448 US 555, the Court pointed the way to the *Publicker* rationale:

> ". . . the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutons would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public . . . to attend the trial."
>
> 448 US at 581-582

and

> "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."
>
> id. at 580, fn 17

The court sealed the transcript of the *in camera* examination of Mary Daly. (RT 338:8-16). While the record appears to show this was done in the presence of counsel, Appellant's attorneys heard no such order. No motion to seal appears in the record, nor was Appellant afforded opportunity to object. What state interest allows a trial court to keep even the eyes of a reviewing court from what is apparently dispositive evidence? (CI 52:28-30). The gross misconduct of counsel charged by Appellant in chambers (CI 45:31-47:4) is quite completely concealed.

> ". . . in custody cases, if a trial judge decides to interview the children *in camera*, the entire proceedings should be taken . . . and made available for appellate review . . . any different construction would frustrate meaningful appellate review . . . The judge's subjective reactions to the responses . . . may be incorrect . . . a record of the hearing would protect the judge from any suspicions of unfairness or false accusations by . . . the losing party . . . depriving a litigant of the opportunity to explain or rebut, particularly where the children's answers may be the deciding factor in the . . . decision, deprives such litigant of due process . . ."
>
> *M.P. v. S.P.* (1979) 169 NJ Super 425, 404 A2d 1256, 100 ALR3d 604 at 617

B. Substantive Due Process

1. NRS Chapter 128 is void for vagueness as applied.

The essential substantive criteria of the trial court's inquiry are suspect. A number of cases have examined the

concept of "best interests of the child" in the termination context.

In *Alsager v. District Court* (DC Iowa 1975) 406 FSupp 10, a state court termination decision was challenged in a civil rights action. The opinion, affirmed on appeal (545 F2d 1137) noted the following:

a. Parents have fundamental liberty and privacy interests in their relationships with natural children. 406 FSupp at 16;

b. A state may not avoid vagueness by denominating the proceedings "civil". id. at 17;

c. The vague standard of "best interests" fails to give ample warning of proscribed conduct. id. at 17;

d. To sustain the burden of a compelling state interest, the consequences of termination must be found to be less harmful than those of continuation. id at 23

e. Notice of the proceedings must be specific factually and legally; a petition paraphrasing statutory language is procedurally unconstitutional. id. at 24.

Reference to the trial court's short decision (CI 50-53) shows the same lack of specificity that brought federal restraint in *Alsager*. Nowhere are the findings supported by evidence:

> "Due to circumstances brought about by her own actions and conduct, [Appellant], to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the 'best interests' of Mary to have parental rights as to her." (CI 50:25-29)

What "circumstances"? What "actions and conduct"? What "reason"? What "condition"? What are Mary's "best interests"?

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare." (CI 51:19-24)

What "reason"? What standards are "minimal[ly] acceptable"? What is the evidence of instability? How does one "qualify" for parental rights?

> "It appears to this court that the situation here is not resolvable without hurting Mary deeply." (CI 52:20-21)

Where is the elimination of the counseling alternative —which has yet to be attempted—as a potential source of resolution?

Alsager listed three dangers of vague statutes: (1) lack of warning as to proscribed conduct; (2) overbroad official discretion; (3) undue inhibition of protected conduct. 406 FSupp at 18. The cure for vagueness is definitive narrowing construction by state courts. *Grayned v. City of Rockford* (1972) 408 US 104. This court should construe the "best interests of the child" standard as permitting termination only as a prerogative of the state upon a threshold showing of serious and unmitigable objective harm to the child. If that is done, this case must be reversed, remanded, and dismissed. Then, if Respondent wishes to pursue some protective limitation of Appellant's visitation rights, she can do so in modification of the exist-

ing custody decree. Such a construction would find accord with the limitations expressed by other high courts:

People in the Interest of C.S. (Colo 1980) 613 P2d 1304:

> Best interests of the child requires (1) a history of severe and continuous neglect by the parent sought to be terminated; (2) a substantial probability of specific future harm; (3) that continuation of the relationship can under no reasonable circumstances benefit the child;

Matter of Swartzfager (Ore 1981) 290 Or 799, 626 P2d 882:

> Courts should hesitate to terminate parental rights for "alienation" of parent-child relationship, regardless of whether parental conduct primarily caused such alienation;

In Re Castillo (Utah 1981) 632 P2d 855:

> ". . . a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe is in the child's best interests . . ."

and

> "when it plainly appears that there is such . . . deficiency . . . in the parent-child relationship that the values inherent therein are almost entirely absent, the law recognizes the need and provides the means for the termination of parental rights."

Matter of Doe (New Mexico 1982) 98 NM 198, 647 P2d 400:

> The court may not balance the backgrounds of the parties and decide which party may provide the "better" environment in termination actions.

Respondent and the trial court have applied the relative considerations of custody cases to the drastic and irrevocable decision to terminate fundamental rights. This

court must define "best interests of the child" narrowly. Construed as a remedy of last resort, termination is clearly misapplied here.

2. A state may not grant a private right to petition for the termination of another's fundamental rights.

a. Judicial enforcement of private prejudice violates the Fourteenth Amendment.

In *Shelley v. Kraemer* (1948) 334 US 1, judicial enforcement of racially restrictive covenants in residential deeds was sought and granted by Missouri courts. The United States Supreme Court reversed, holding that, although private acts of discrimination are beyond the reach of the Fourteenth Amendment, the state could not give effect to such prejudice through judicial enforcement of discriminatory agreements.

The Court has spoken recently of *Shelley* in the custody context. In *Palmore v. Sidote* (April 25, 1984) 44 CCH SCt Bull B 2424, 52 USLW 4497, child custody had been changed because of the mother's racially mixed remarriage and the father's assertion of harmful stigma arising therefrom:

> "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."
>
> 44 CCH SCt Bull B 2428

Appellant submits that, contrary to her fundamental parental rights, the trial court has given effect to the private prejudices of Respondent. (RT 260:1129; 261:21-27; 262:16-263:27; 265:16-266:7). The trial court has clearly indulged not a legal judgment that Appellant presents actual or threatened harm to her child, but a value judgment that Appellant is not "normal", whatever that is. (CI 51:27-30). The white citizens of Missouri doubtless felt it

was not "normal" for blacks to live among them and agreed to exclude the latter; more than thirty years ago, the Supreme Court forbade judicial assistance of private prejudice.

The Court in *Santosky v. Kramer, supra,* noted that termination actions often leave "determinations unusually open to the subjective values of the judge" (455 US at 762):

> "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias."
>
> 455 US at 763

The trial court has expressed a bias for "normal" persons, without definition. Appellant submits that this is cultural bias.

b. Termination of parental rights in a post-decree contest between divorced spouses violates res judicata and the Fourteenth Amendment.

Santosky v. Kramer concerned the power of the state to initiate proceedings to terminate the fundamental parental rights of parents deemed by its agencies to be incapable of proper parenting. Appellant has not found a single case in the pacific Reporter where parental rights were terminated in other than the following circumstances:

1. Child abuse of serious neglect cases, in which the children are taken from the parent(s) in an exercise of the inherent *parens patriae* power to intervene where overt harm is palpable, (see, for example, *Pima County Juvenile Actions Nos. S-826 & J-59015* (1982) 132 Ariz 33, 643 P2d 736; *Matter of Doe* (1982) 98 NM 198, 647 P2d 400; *In Re James M.* (1976) 65 CalApp3d 474, 135 CalRptr 222);

2. Nonconsent adoptions, usually by stepparents or foster parents, under stringent requirements of neglect, abandonment, or unfitness, (see *Carson v. Lowe* [*In Re Carson*] (1961) 76 Nev 446, 357 P2d 591; *Casper v. Huber* (1969) 85 Nev 474, 456 P2d 436);

3. Delinquency cases, in which criminal conduct by a minor is found to be the result of grossly inadequate parenting;

In the first category are numerous sickening examples of the helplessness of children confronted by physical violence, sexual abuse, or parental ignorance of or inattention to the basics of hygiene, nutrition, or social training. These cases are not pleasant reading and have nothing whatsoever to do with Appellant's situation.

In the second category, adoptions, are cases where a strong presumption in favor of a stable home life guides a policy judgment between natural parents who have become estranged from their children (often by incarceration or abandonment), and those who have provided a stable home life in lieu of natural parents. Respondent does not seek to replace a willfully absent parent with an appropriately concerned surrogate, but rather simply to eliminate a former spouse she deems unfit. Such a course is not one of Respondent's prerogatives.

The third category does not apply to Mary Daly, who is a good citizen by any standard. (RT 49:16-20; 50:4-25; 91:2-8; 92:26-28; 93:5)

In more than one hundred termination cases, Appellant has found none based on the kinds of value judgments typically made in custody cases, where the "better" or "more normal" home often prevails. (see, for example, *Painter v Bannister* (1966) 258 Iowa 1390, 140 NW2d 152,

158, cited by this court in reversing a termination decree in *Chapman v Chapman* (1980) 96 Nev 290, 607 P2d 1141). THIS IS AN ACTION TO PERMANENTLY SEVER A FUNDAMENTAL RELATIONSHIP OF PARENT AND CHILD. It cuts off Mary Daly from any right to support and inheritance (*State Welfare Division v Vine* (1983) 99 Nev 270, 662 P2d 295) and leaves a loving natural parent in a legal limbo as to the property set aside in the dissolution decree. Appellant dearly wants to be a parent, to support, love and nurture Mary; she has been deprived of the opportunity to do so. It is this perversion of child protection statutes of which she complains.

NRS Chapter 128 bristles with the indicia of neglected-child laws: "welfare administrator", "investigation", "foster care", "case plan". It clearly applies to different situations than interspousal conflict over custody and visitation.

Absent any indication in Chapter 128 that is was intended to supersede final dissolution custody decrees without a threshold requirement justifying state action, Appellant argues that the statute violates the Fourteenth Amendment as applied to a post-decree conflict where the challenged parent has consistently sought a nurturing relationship which has been frustrated by the custodial parent and local authorities; the courts and law enforcement have enforced the private prejudices of Respondent and have thereby violated liberty, property, and privacy interests of Appellant.

The application of the state-action threshold also makes clear the *res judicata* problem here: if a stepparent, foster parent, or welfare official enters the controversy, the iden-

tity of parties and interests requirement of *res judicata* ceases to apply and the issues raised by a new party may be addressed. The second *Turner v Saka* case (1976) 92 Nev 108, 546 P2d 233, shows the consent requirement in adoption cases. It is only in nonconsent adoptions or neglect/dependency cases that the issues tried herein—as though in an ordinary civil action—even become justiciable; the entry of new parties and the policy bases of either adoption or protection remove the bar of res judicata.

3. Sex reassignment under medical supervision is protected conduct.

A number of cases have addressed the power of the state to prohibit or discourage sex reassignment through penal or civil law; many states have enacted ameliorative statutes and regulations to ease the transition. It is settled law that sex reassignment under medical supervision is protected conduct.

a. Penal sanctions: laws against cross-dressing have been held violative of liberty and privacy interests. *Wallace v City of Chicago* (1978) 75 Ill2d 525, 389 NE2d 522; *Doe v McConn* (DC Tex 1980) 489 F Supp 76. Each held that the trial period of the preoperative transsexual is medically necessary and a private decision between doctor and patient. Respondent and the trial court clearly want to make Appellant's medical decisions for her, under penalty of losing fundamental rights. The state may not penalize what it cannot forbid.

b. Family law: *M.T. v J.T.* (1976) 140 NJ Super 77, 355 A2d 204 found a postoperative male-to-female transsexual wife a woman for alimony purposes and is a good analysis of the criteria to be applied to transitional individuals; In *Christian v Randall* (Colo App 1973), 516 P2d 132, cited to the trial court at CI 32:5-

17), a female-to-male transsexual mother who had married a woman had her custody challenged by the father on grounds of an unwholesome environment. The decision stressed the need for individualized decision-making and avoidance of arbitrary notions of unfitness. It is as squarely on point as any authority herein.

c. A very recent federal employment discrimination case deserves scrutiny, because it is the first in the area to really address the arbitrary and invidious burdens unenlightened society heaps upon the daily lives of transsexuals. *Ulane v Eastern Airlines* (DC Ill 1984) 581 FSupp 821 involved a pilot with 12 years service who underwent reassignment during a leave of absence and was terminated when she attempted to return to work. In a long, factual opinion, District Judge Grady blasted the airline for manifest hypocrisy:

> ". . . Eastern made no effort whatsoever to determine what the situation was . . . They simply did not have enough information to take the position that they did: namely, that you can categorize transsexuals across the board as persons who would represent a safety problem in a stressful situation. That generalization is no more true of transsexuals than it would be of people who are left-handed of who are dyed-in-the-wool Republicans. It is no escape from that fact to say, 'Well, we just do not know.' Ignorance, prejudice, discrimination, and hatred have throughout history been justified by, 'We do not know; we cannot take a chance.'" 581 FSupp at 837

Thus, when the trial court finds: "There is is serious risk of physical, mental and emotional harm to this child should we take a chance. The court must face reality in this situation." (CT 52:25-27), Appellant complains of judicial ignorance, prejudice, discrimination, and hatred. The trial court has not faced reality, but given in to irrational fear.

Judge Grady: "... it cannot be said with any rationality that all transsexuals are unsafe airline pilots." 581 FSupp at 837

The Trial Court: "Mary doesn't need to be exposed to a person who has what Dr. Pauly calls a 'gender identity' problem ..." CI 52 at 10-12

Since transsexualism is defined as a disorder of gender identity, or one's inner sense of being male or female, the trial court's sweeping fiat of parental exclusion is definitive arbitrariness; it is a deficient reason for termination.

d. Legislative responses: California and a number of other states have enacted statutes to facilitate the public recordkeeping problems transsexuals face. *California Health & Safety Code Sections 10475-10479* allow a postoperative transsexual to file for a new birth certificate reflecting his or her new name and sex. California Driver's License Examiner's Manual Section 21301 allows a preoperative transsexual to get a license in the new name and sex with a letter from a qualified professional.

A transsexual's reassignment process is conduct protected by constitutional decisions, family law decisions, and ameliorative statutes and regulations. The trial court has arbitrarily attached an onerous penalty to that process. Nevada is without right to so limit Appellant's privacy and liberty.

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